APPENDIX A

Opinion and Judgment Below

IN THE UNITED STATES DISTRICT COURT FOR THE

MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

CIVIL ACTION No. 2649-N

ALABAMA STATE TEACHERS ASSOCIATION, a corporation; ALVIN A. HOLMES; WILLIAM SANKEY; ALBERT HARRIS; SYLVESTER PRESSLEY; and JOE L. REED, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

ALABAMA PUBLIC SCHOOL AND COLLEGE AUTHORITY, a corporation; ALBERT P. BREWER, individually and as President of the Authority; ERNEST STONE, individually and as Vice President of the Authority; ROBERT B. INGRAM, individually and as Secretary of the Authority; AGNES BAGGETT, individually and as Treasurer of the Authority; and E. L. WYNN, M. H. MOSES, PAUL S. HOLLEY, R. C. BAMBERG, REDUS COLLIER, JOHN W. OVERTON, JOHN PACE, III, SIM A. THOMAS, ROBERTS H. BROWN, and FRANK P. SAMFORD, as members of the Board of Trustees of Auburn University, and THE BOARD OF TRUSTEES OF AUBURN UNIVERSITY,

Defendants.

Before GEWIN, Circuit Judge, and JOHNSON and PITTMAN, District Judges.

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JOHNSON, District Judge:

The plaintiffs in this class action seek to prevent the State of Alabama from constructing and operating a four-year, degree-granting extension of Auburn University in the City of Montgomery, Alabama. Plaintiffs originally sought a declaratory judgment as to the invalidity of and an injunction against any action under or pursuant to Alabama Act No. 243 of 1965 and Alabama Act No. 403 of 1967.[1]

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[1] Alabama Act No. 243 of 1965 authorizes the formation of the Alabama Public School and College Authority, a public corporation, having the power, among other things, "to provide for the construction, reconstruction, alteration and improvement of public buildings and other facilities for public educational purposes in the State, including the procurement of sites and equipment therefor; to anticipate by the issuance of its bonds the receipt of the revenues" from those portions of the state sales tax and state use tax that are required to be paid into the Alabama Special Educational Trust Fund by issuing bonds solely out of and secured by a pledge of the said portions of those excise taxes. The Act authorizes the Authority to issue and sell bonds not exceeding $116,000,000 in aggregate principal amount and provides for the allocation of proceeds from the sale of the bonds, in the amounts specified therein, to educational institutions (including Auburn University) named in Section 10 of the Act. Section 10 identifies some of these institutions as "Negro."

Alabama Act No. 403 of 1967 authorizes the Alabama Public School and College Authority to issue and sell bonds in the principal amount of $5,000,000 in addition to all other bonds theretofore issued or authorized to be issued by the Authority, the net proceeds of which "shall be distributed to Auburn University to be used by the board of trustees thereof for construction and equipment of physical facilities for conducting a four-year college or branch of the University in the City of Montgomery and for the support and maintenance of such college for each of the fiscal years ending September 30, 1968 and September 30, 1969."

While originally alleging that both acts were unconstitutional as being racially discriminatory and that Act No. 243 was unconstitutional "on its face and as applied," plaintiffs at the beginning

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Jurisdiction is invoked pursuant to 28 U.S.C. §1343 and 28 U.S.C. §1331. Plaintiffs seek a declaratory judgment that Act No. 403 of 1967 is unconstitutional and also seek an injunction against the enforcement, operation and execution of the said act. A three-judge court was convened to hear this cause pursuant to 28 U.S.C. §§2281, 2284.

The defendant Alabama Public School and College Authority is a corporation formed by the defendants the Governor, the State Superintendent of Education, and the Director of Finance pursuant to Alabama Act of 1965 No. 243. Defendant is authorized, *inter alia,* "from time to time to sell and issue its bonds, not exceeding One hundred sixteen million dollars ($116,000,000) in aggregate principal amount, for the purpose of providing funds for construction, reconstruction, alteration and improvement of buildings and other facilities for public educational purposes in the State. . . ." Alabama Acts 1965, No. 243, §8. Section 10 of the Act sets out detailed appropriations of the authorized monies to the various public colleges. Alabama Acts 1967 No. 403 authorizes the defendant Authority to issue and sell additional bonds in the principal amount of $5,000,000 for the purpose of constructing, equipping, establishing, creating, supporting and maintaining a four-year college at Montgomery under the supervision and control of defendant Board of Trustees of Auburn University.

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of the hearing on the merits of this case announced an abandonment of their challenge to Act No. 243:

> "Mr. Gray: If it please the Court, the plaintiffs do not insist and do not urge upon the Court at this time to declare unconstitutional Act Number 243, which was adopted on May 4, 1965, creating the Alabama Public School and College Authorities . . ."

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Plaintiff Alabama State Teachers Association is a non-profit corporation whose membership consists of approximately 10,000 Negro teachers, a majority of whom are graduates of Alabama State College, located in Montgomery, Alabama, and many of whom are instructors and teachers at state-supported Negro colleges and schools in Alabama. Additional plainitffs are Negro students and alumni of Alabama State College and the Executive Secretary of Alabama State Teachers Association.

This cause is now submitted upon the pleadings, several motions to dismiss and supporting briefs, the testimony of numerous witnesses and accompanying exhibits and post-trial memoranda.

The plaintiffs first contend that Act No. 243 designates certain of the schools named therein for use by members of that class or race of persons commonly referred to as Negroes. Racial classifications are always suspect and subject to the most rigid scrutiny and in most cases are irrelevant to any acceptable legislative purpose. *Loving* v. *Virginia,* 388 U.S. 1 (1967); *McLaughlin* v. *Florida,* 379 U.S. 184 (1964). We do not reach the issue, however, because plaintiffs claim no injury due to and request no relief from the operation of that statute. We will, however, as plaintiffs request, consider the racial classification set forth in Act No. 243 for whatever evidentiary weight it may have on the question of the constitutionality of Act No. 403.

Plaintiffs' challenge to Act No. 403 proceeds on two grounds. First they argue that to the extent that this act authorizes the sale of bonds and the distribution of the proceeds thereof to Auburn University to be used for the "support and maintenance" of such college for each

of the fiscal years ending September 30, 1968 and September 30, 1969, Act No. 403, when read in conjunction with §11 of Act No. 243, constitutes "a pledge of revenues of future fiscal years for the purpose of obtaining funds with which to meet current operating expenses," and therefore contravenes Constitution of Alabama of 1901, Art. 11, §213.

This allegation raises a question of state law, a question which by itself would not support the jurisdiction of a federal court. While pendent jurisdiction over the state law claim might be said to exist because the claim also presents a substantial federal question, *Brown & Root, Inc.* v. *Gifford Hill & Co.*, 319 F.2d 65 (5th Cir. 1963); 1 Barron and Holtzoff, Federal Practice and Procedure §23 (1960); this seems to be a case where that jurisdiction should be declined. *Sunbeam Lighting Company* v. *Pacific Associated Lighting, Inc.*, 328 F.2d 300 (9th Cir. 1964); *Strachman* v. *Palmer*, 177 F.2d 427 (1st Cir. 1949); 5 A.L.R. 3d 1040, 1058. Neither of the parties has expended energy on this issue; thus, because it has not been given a full adversary airing, this issue, with repercussions far beyond this case, is hardly ripe for determination by this Court. Plaintiffs' claim on this issue is dismissed without prejudice to their proceeding in an appropriate state court.

Plaintiffs' primary attack on Act No. 403 may be stated as a syllogism: Alabama historically has had a dual system of higher education by law; although no longer supported by law, the dual system in fact remains largely intact; this Court and the Fifth Circuit recognize in the elementary and secondary education area an affirmative duty to dismantle the dual system, *Lee* v. *Macon County Board of Education*, 267 F. Supp 458 ((M.D. Ala. 1967), *aff'd* 389

U.S. 215 (1967), *United States* v. *Jefferson County Board of Education*, 372 F.2d 836 (1966); *aff'd en banc* 380 F.2d 385 (5th Cir. 1967), *cert. denied* 389 U.S. 840 (1967); that duty is equally applicable to higher education; that duty requires officials to utilize new construction or expansion of facilities as an opportuniy to dismantle the dual system; the history and operation of Acts Nos. 243 and 403 indicate that in planning the construction of the Auburn branch at Montgomery defendants did not maximize desegregation; therefore, their action is unconstitutional and should be enjoined.

At the outset it should be noted that this argument presents a case of first impression. To our knowledge, no court in dealing with desegregation of institutions in the higher education area has gone farther than ordering nondiscriminatory admissions. That is also as far as Congress went in the 1964 Civil Rights Act.[2] The Department of Health, Education and Welfare has also largely limited its concern to admissions policies in administering Title 6 of the 1964 Civil Rights Act.[3]

We too are reluctant at this time to go much beyond preventing discriminatory admissions. Although much of plaintiffs' argument is valid, several faulty premises lead us to reject the conclusion they urge upon us. We would judicially notice that Alabama has traditionally had a dual system of higher education. Furthermore, we find

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[2] 42 U.S.C. §2000c-4(a)(2). Compare subsection (2) with subsection (1), which seems to authorize a wider range of civil action by the Attorney General in the elementary and secondary school area.

[3] 45 C.F.R. §80.4(d). Compare subsection (d) with subsection (c), which for elementary and secondary schools requires a plan for desegregation. Pursuant to this, H.E.W. has compiled an elaborate set of guidelines. See 45 C.F.R. §181 (1967).

as a fact that the dual system in higher education has not been fully dismantled. The law is clear also that the State is under an affirmative duty to dismantle the dual system. Indeed, in *Lee* v. *Macon County Board of Education, supra,* we required the state colleges and junior colleges to refrain from discrimination in admissions and to begin faculty desegregation. We do not agree, however, with the characterization of the college authorities' conduct, nor do we agree that the *scope* of the duty should be extended as far in higher education as it has been in the elementary and secondary public schools area.

Plaintiffs fail to take account of some significant differences between the elementary and secondary public schools and institutions of higher education and of some related differences concerning the role the courts should play in dismantling the dual systems. Public elementary and secondary schools are traditionally free and compulsory. Prior to "freedom of choice," children were assigned to their respective schools. This could be done with equanimity because, in principle at least, one school for a given grade level is substantially similar to another in terms of goals, facilities, course offerings, teacher training and salaries, and so forth. In this context, although reluctant to intervene, when the Constiution and mandates from the higher courts demanded it, we felt that desegregation could be accomplished, and that the requirements of the law would be met, without our being involved in a wide range of purely educational policy decisions. Accordingly, we felt, in dealing with the problem of desegregating the elementary and secondary public schools, that we could and should review decisions concerning the impact of site selection for new construction or expansion without overreaching our area of competence.

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Higher education is neither free nor compulsory. Students choose which, if any, institution they will attend. In making that choice they face the full range of diversity in goals, facilities, equipment, course offerings, teacher training and salaries, and living arrangements, perhaps only to mention a few. From where legislators sit, of course, the system must be viewed on a statewide basis. In deciding to open a new institution or build a branch or expand an existing institution, and in deciding where to locate it, the legislature must consider a very complicated pattern of demand for and availability of the above-listed variables, including, also, impact on the dual system. We conclude that in reviewing such a decision to determine whether it maximized desegregation we would necessarily be involved, consciously or by default, in a wide range of educational policy decisions in which courts should not become involved. A brief review of the background of this case will, we think, reveal the wisdom of this conclusion.

At the present time there are four institutions of higher learning in Montgomery: two private—Huntingdon College and Alabama Christian College—and two public—Alabama State College and the University of Alabama Montgomery Extension Center. The Center does not grant degrees; its offerings are similar to those of a junior college. Alabama State is a predominantly Negro four-year liberal arts college with an emphasis on education of teachers.

Interest in another state-supported institution in Montgomery was initially generated in the local Chamber of Commerce. A committee was appointed to determine the need for such a school. Having determined that the need existed, they proceeded to investigate ways and means.

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Apparently it was assumed from the beginning that expansion of the Alabama Extension Center was the way to proceed. Thus, University of Alabama officials were approached to discuss their willingness to undertake an expansion. The University determined that it had sufficient commitments with other branch expansions. At that point, Auburn University was approached and it agreed to undertake the project. The University of Alabama agreed to cooperate in the transition from the University Center to the new operation. A Montgomery legislative delegation was then successful in securing a legislative appropriation for the project. Prior to this litigation a vice president for the Auburn branch was nominated. He submitted an academic plan that projected a long-range enrollment of 15,000 students. Current plans call for undergraduate majors in Liberal Arts, Business, and Teacher Education, as well as graduate work in appropriate areas, *e.g.*, Education, Business Administration, and Political Science.

Plaintiffs make a number of contentions concerning this history. They maintain that the reason for having a new college in Montgomery was to provide for white students in the area. To the extent that this may mean "to provide for white students only," the record does not bear them out. Plaintiffs rely heavily upon testimony that 137 students commuted from Montgomery County for the purpose of attending the Alexander City State Junior College located at Alexander City, Alabama, although Montgomery County is not supposed to be in that school's geographic area. However, it is noted that 12 of those 137 students are Negroes, and there is nothing in the record now before this Court to indicate that those Negroes, if they so desire, will not be absorbed into the new Auburn

branch in Montgomery along with other Negroes and whites.

Plaintiffs further contend that inadequate consideration was given to how the proposed Auburn branch might be operated so as to eliminate the dual school system and that, because of this, the new college has become and will continue to be an identifiably "white" institution. This contention is based partly on the assertion that Auburn University is an identifiably "white" institution. In a sense that is so, but in that sense nearly every existing institution is "identifiable." If such identity precludes expansion, none could expand. Plaintiffs' contention that inadequate attention was given to desegregation is also based on defendants' failure to give serious consideration to expanding Alabama State College as an alternative to establishing the Auburn branch. But this argument overlooks the fact that Alabama State is at least as identifiably "black" as Auburn is identifiably "white." In terms of eliminating the dual school system, one label is no more preferable than the other.

We thus reject plaintiffs' conclusion that, when the new college is put into operation, Montgomery will have two colleges—one Negro, one white. As plaintiffs themselves indicate: "In terms of anything heretofore existing in Montgomery, the Auburn branch will be for all practical purposes a 'new institution.'" It is certainly as reasonable to conclude that a new institution will not be a white school or a Negro school, but just a school, as it is to believe that Alabama State would so evolve.

Much of the above discussion is based on speculation; this is necessarily true because much of plaintiffs' argument is based on speculation. However, the discussion

does serve to show that in the discharge of the duty to maximize desegregation, the Auburn branch is at least arguably as acceptable as any alternative proffered by plaintiffs.

Defendants apparently did not seriously evaluate Alabama State College's potential as an alternative. But at the hearing evidence was introduced that tended to show that Auburn would be more suitable for the purposes envisioned because it could offer a wider range of courses, greater breadth and depth of faculty, and greater physical resources. It was also considered important by the educator witnesses that Auburn had higher admission and transfer requirements. Some evidence that the preference for Auburn's offerings over those of Alabama State was based on educational grounds is the fact that defendants rejected an offer to operate the branch from Troy State University, an institution not unlike Alabama State except that it is larger and is traditionally predominately white.

Auburn University has been ordered by this Court to admit all qualified Negroes on terms consistent with the equal protection clause of the Fourteenth Amendment. *Franklin* v. *Parker*, 223 F. Supp. 724 (M.D. Ala. 1963), *modified* and *aff'd* 331 F.2d 841 (5th Cir. 1964). It would appear that Auburn has abided and will continue to abide by that order in good faith. Testimony indicated that it has recruited and is continuing to recruit more Negro faculty members.

We conclude, therefore, that as long as the State and a particular institution are dealing with admissions, faculty and staff in good faith the basic requirement of the affirmative duty to dismantle the dual school system on the college level, to the extent that the system may be based upon racial considerations, is satisfied.

This is not to suggest that we view the problem as merely personal rather than systematic. As plaintiffs indicated, nondiscriminatory admissions in higher education are analogous to a freedom-of-choice plan in the elementary and secondary public schools. We are also cognizant that recent Supreme Court decisions[4] have cast doubt on the continued viability of freedom of choice in the public schools. But we do not interpret those decisions as applying to the operation of an education system on a college level. Freedom to choose where one will attend college, unlike choosing one's elementary or secondary public school, has a long tradition and helps to perform an important function, *viz.*, fitting the right school to the right student.

We believe that an effective beginning has been made at Auburn to dismantle the racial characteristics of that school system and that, as effective desegregation plans are developed in the elementary and secondary public schools, the problem will probably resolve itself in the case of higher education. If the Auburn branch at Montgomery is administered as "just a school," as we are assured it will be and as we are confident it will be, our conclusions as herein outlined will receive significant confirmation.

Accordingly, it is the ORDER, JUDGMENT and DECREE of this Court that the challenged statute, Alabama Act No. 403, 1967 Legislature, is not unconstitutional on its face or as applied to plaintiffs; it is further ORDERED that the relief

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[4] *Green* v. *County School Board of New Kent County*, 36 U.S.L. Week 4476 (U.S. May 27, 1968), and the companion cases *Monroe* v. *Board of Commissioners of the City of Jackson*, 36 U.S.L. Week 4480, and *Raney* v. *Board of Education of Gould School District*, 36 U.S.L. Week 4483.

herein sought by plaintiffs be and the same is hereby denied.

It is further ORDERED that the costs in this proceeding be and they are hereby taxed against the plaintiffs, for which execution may issue.

Done, this the 26th day of July, 1968.

WALTER P. GEWIN
United States Circuit Judge

FRANCIS JOHNSON
United States District Judge

VIRGIL PITTMAN
United States District Judge

APPENDIX B

RACIAL IDENTITY OF STUDENTS AT STATE SENIOR COLLEGES AND UNIVERSITIES IN ALABAMA, FALL, 1967

Name of Institution	*Students Enrolled by Race*	
	White	*Negro*
Alabama A. & M.	15	1,960
Alabama State	2	1,731
Florence	2,938	67
Jacksonville	4,988	38
Livingston	1,296	17
Troy	3,820	62
Total	13,059	3,875

[Taken from Part I of P-1 to Dr. Stone's Deposition, R. 693, App. D, *infra* p. 17a]

Auburn University

	White	*Negro*
Undergraduate	11,979	28
Graduate	1,114	13
	13,093	41

[Taken from P-1 to Dr. Philpott's Deposition, R. 105, 106]

	White	*Negro*
University of Alabama	14,706	193
Alabama College	2,451	2
University of South Alabama	3,084	150

(Undergraduate Enrollment Only)

[Taken from App. C, *infra*]

APPENDIX C

The following material represents part of a summary of estimates submitted in compliance reports by most colleges and universities to the U. S. Office for Civil Rights for the fall of 1967 as reprinted in *The Chronicle of Higher Education,* April 22, 1968.

WHITE, NEGRO UNDERGRADUATES AT COLLEGES ENROLLING 500 OR MORE, AS COMPILED FROM REPORTS TO U.S. OFFICE FOR CIVIL RIGHTS

Alabama	*White*	*Negro*	*Other*
Alabama A&M C	4	1,884	0
Alabama C	2,451	2	5
Alabama St C	2	1,732	0
Alexander City St JC	852	24	0
Auburn U	11,979	28	24
Birmingham Southern C	1,049	19	0
Enterprise St JC	817	30	2
Gadsden St JC	2,080	54	0
Geo C Wallace St JC	652	16	1
Huntington C	937	2	0
Jacksonville St U	4,884	37	13
Jefferson St JC	3,437	163	1
John C. Calhoun St JC	1,401	72	0
Livingston St C	1,300	20	8
Miles C	1	1,024	0
Mobile St JC	0	749	0
Northeast Ala St JC	755	0	0
Oakwood C	3	620	3
St Bernard C	783	1	2
Spring Hill C	1,011	42	2
Stillman C	2	709	2
Troy St C	2,833	9	0

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Alabama	*White*	*Negro*	*Other*
Tuskegee Inst	26	2,885	127
U of Alabama	14,706	193	35
U of South Alabama	3,084	150	2
Wenonah St JC	0	702	0
Wm L Yancey St JC	973	20	2

APPENDIX D

[Taken from P-1 to Dr. Stone's Deposition, R. 693]

RACIAL IDENTITY OF STUDENTS AND FACULTY MEMBERS OF JUNIOR COLLEGES, TRADE SCHOOLS AND COLLEGES UNDER SUPERVISION AND CONTROL OF THE ALABAMA STATE BOARD OF EDUCATION, FIRST QUARTER OR FIRST SEMESTER, 1967-68[1]

	Students Enrolled by Race				*Teaching Staff by Race*			
Name of Institution	*White*	*Negro*	*Other*	*Total*	*White*	*Negro*	*Other*	*Total*
I. *Senior Colleges*								
Alabama A. & M.	15	1,960	1	1,976	12	90	8	110
Alabama State	2	1,731	0	1,733	2	75	8	85
Florence	2,938	67	2	3,007	187	2	0	189
Jacksonville	4,988	38	18	5,044	164	3	6	173
Livingston	1,296	17	2	1,315	60	0	0	60
Troy	3,820	62	23	3,905	159	2	1	162
Total	13,059	3,875	46	16,980	584	172	23	779
II. *Junior Colleges*								
Alexander City	932	26	0	958	40	0	0	40
John C. Calhoun	1,401	72	0	1,473	69	0	0	69
Jefferson Davis	486	31	0	517	18	0	0	18
Enterprise	814	30	3	847	36	0	0	36
Gadsden	2,089	54	0	2,143	93	0	0	93
Patrick Henry	346	20	0	366	19	0	0	19
Jefferson State	3,432	163	1	3,596	173	0	0	173
Mobile	0	790	0	790	2	31	1	34
Northeast Alabama	753	0	0	753	33	0	0	33
Northwest Alabama	484	5	0	489	22	0	0	22
Snead	405	0	0	405	26	0	0	26
Southern Union	459	12	1	472	26	0	0	26
George C. Wallace	665	16	1	682	34	0	1	35
Wenonah	0	702	0	702	1	37	0	38
William L. Yancey	975	20	3	998	40	0	0	40
Total	13,241	1,941	9	15,191	632	68	2	702

[1] Information not available prior to 1967-68. No information available on administrative personnel.

Name of Institution	Students Enrolled by Race				Teaching Staff by Race			
	White	Negro	Other	Total	White	Negro	Other	Total
III. *Trade Schools*								
Ala. Inst. of Avia. Tech.	260	4	0	264	20	1	0	21
Ala. School of Trades	1,131	9	1	1,141	32	0	0	32
Harry M. Ayers	245	27	2	274	16	0	0	16
Bessemer	381	111	0	492	28	0	0	28
John C. Calhoun	583	34	0	617	44	0	0	44
Carver	0	172	0	172	0	17	0	17
J. F. Drake	2	172	0	174	1	18	0	19
Gadsden	2	174	0	176	0	13	0	13
Richmond P. Hobson	152	1	0	153	13	0	0	13
J. F. Ingram	358	200	0	558	17	1	0	18
William Rufus King	170	7	0	177	14	0	0	14
Douglas MacArthur	241	13	0	254	20	1	0	21
Muscle Shoals	164	27	0	191	15	0	0	15
Northwest Alabama	290	3	0	293	23	0	0	23
N. F. Nunnelley	182	39	0	221	15	1	0	16
Opelika	439	56	0	495	31	0	0	31
John M. Patterson	313	8	0	321	26	0	0	26
Ed E. Reid	180	23	0	203	10	0	0	10
Shelton	321	18	1	340	28	0	0	28
Southwest State	509	13	2	524	35	0	0	35
Sparks	165	33	0	198	13	0	0	13
Councill Trenholm	0	556	0	556	1	17	0	18
Tuscaloosa	0	192	0	192	0	13	0	13
Walker County	169	25	0	194	16	0	0	16
George C. Wallace (Dothan)	348	41	0	389	30	0	0	30
George C. Wallace (Cullman)	166	3[2]	0	169	13	0	0	13
Wenonah	0	291	0	291	0	23	0	23
Total	6,771	2,252	6	9,029	461	105	0	566
GRAND TOTAL	33,071	8,068	61	41,200	1,677	345	25	2,047

[2] Applied but not enrolled as of date report was made.

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